Appendix A

Delbert Kaahanui Wakinekona,
Plaintiff/Appellant,

v.

Antone Olim, Edith M. Wilhelm, John Smythe,
Winton Leong and Edwin Shimoda,
Defendants/Appellees.

No. 78-3092.

United States Court of Appeals,
Ninth Circuit.

Submitted Aug. 14, 1980.
Decided May 26, 1981.

Appeal from the United States District Court
for the District of Hawaii

Before: GOODWIN, FLETCHER and CANBY,
Circuit Judges.

CANBY, Circuit Judge.

In August 1976, Delbert Kaahanui Wakinekona sought to challenge his transfer from Hawaii State Prison to Folsom State Prison in California. Wakinekona sued in the Federal District Court for the District of Hawaii under 42 U.S.C. § 1983, alleging that he was transferred in violation of the due process clause of the fourteenth amendment. The district court dismissed his complaint, holding that the Hawaii statutes and regulations governing prison transfers did not create a substantive liberty interest protected by the due

process clause. Wakinekona appealed the resulting judgment. We reverse the decision of the district court, 459 F.Supp. 473.

I.

Wakinekona was an inmate of the Hawaii State Prison, sentenced to life imprisonment and confined to the maximum control unit. On August 2, 1976, he appeared at a program classification hearing, the stated purpose of which was to determine the reason for the failure of programs within the maximum control unit. As a result of that hearing. Wakinekona was one of two inmates singled out as troublemakers. On August 5, he received notice that the prison program committee would consider at an August 10 hearing whether he should be transferred to another prison in Hawaii or to a mainland prison. The August 10 hearing was conducted by the same persons who presided at the August 2 hearing. The program committee decided that Wakinekona should be transferred to Folsom because of reports that he frequently threatened and intimidated prison guards. Wakinekona was transferred to Folsom. The notice to California prison authorities stated that Wakinekona "has a background of aggravated battery and a history of escape from prison. He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. . . ."

Wakinekona claimed that his transfer violated the due process clause because the committee which decided to transfer him was biased against him. He alleged that the committee was composed of the same persons who initiated the transfer proceedings, in direct violation of Hawaii

prison regulations. The regulations require that an impartial committee make such decisions, and specifically exclude from the committee any persons who were actively involved in initiating the transfer proceedings. Wakinekona argued that because he was denied a hearing before an impartial tribunal, his transfer violated the due process clause. The district court found, however, that the prison transfer regulations did not create a substantive liberty interest protected by the due process clause, and dismissed his complaint.

II.

In *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed. 2d 451 (1976), and *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 446 (1976), the Supreme Court held that prison transfers do not automatically trigger the protections of the due process clause. The gist of those decisions was that the day-to-day functioning of state prisons is the business of the states, not of federal judges. Therefore, the Court held that the due process clause does not impose a nationwide rule requiring hearings before all prison transfers. *Fano*, 427 U.S. at 229, 96 S.Ct. at 2540. The court also recognized, however, that individual states are free to require prison transfer hearings by statute or by regulation. Hawaii has enacted a set of prison transfer regulations. They clearly condition prison transfers involving a "grievous loss" upon a hearing by an impartial committee established by the prison administrator. Art. IV(2), Supplementary Rules & Regulations of the Corrections Division, Department of Social Services & Housing, State of Hawaii. The regulations also define an inter-

state as a "grievous loss". The question we face is whether an interstate prison transfer falling within the scope of these regulations invokes the protections of the due process clause.

The result in *Fano* and *Haymes* depended upon two factors. First, the Court rejected the idea that *any* "grievous loss" imposed upon a prisoner implicates due process. The Court stated that not every change in the conditions of the confinement of an inmate is of constitutional magnitude. The Court concluded that the intrastate transfers involved in *Fano* and *Haymes* did not implicate due process because "confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Fano,* 427 U.S. at 225, 96 S.Ct. at 2538. Second, the Court found that the state laws and regulations governing intrastate prison transfers did not create a substantive liberty interest. The Court stated that a substantive liberty interest might be created by the state if there were "some right or justifiable expectation rooted in state law that [the inmate] will not be transferred except for misbehavior or upon the occurrence of other specified events." *Haymes,* 427 U.S. at 242, 96 S.Ct. at 2547. The Court could find no such right or expectation in the statutory schemes of Massachusetts or New York.

The Court expanded upon its analysis of prison transfers in *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), which dealt with the transfer of an inmate from prison to a mental hospital. The Court held that such a transfer triggered the application of the due process clause for two independent reasons: (1) it involved the imposition

of qualitatively different conditions beyond the range of those justified by the conviction and sentence; and (2) state law gave rise to a liberty interest by creating an objective expectation that a prisoner would not be transferred to a mental hospital unless he suffered from a mental disease or defect that could not be adequately treated in prison.

We need not address the question whether transfer of a prisoner from Hawaii to California involves such qualitatively different conditions that it exceeds the range of confinement justified by his sentence,[1] because we conclude that the Hawaii prison regulations created a liberty interest subject to due process protection.

III.

In *Fano* and *Haymes*, the Supreme Court found that the state laws governing prison transfers did not create a substantive liberty interest. "Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct." *Fano*, 427 U.S. at 226, 96 S.Ct. at 2539. Under New York law, a prisoner "had no right to remain at any particular prison facility and no justifiable expecta-

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[1]This court has held that an inmate's transfer from Hawaii State Prison to a state prison in California does not raise any constitutional issues. *Hillen v. Director of Department of Social Services*, 455 F.2d 510, 511 (9th Cir. 1972); *see also Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974) (involving transfers from Alaska to other states). These cases preceded *Fano*, *Meachum* and *Vitek*, however. Interstate transfers were also held not to implicate due process in *Sisbarro v. Warden*, 592 F.2d 1, 3 (1st Cir. 1979) and *Cofone v. Manson*, 594 F.2d 934, 937 n.4 (2d Cir. 1979). These cases were decided after *Fano* and *Meachum* but before *Vitek*.

tion that he would not be transferred unless found guilty of misconduct." *Haymes*, 427 U.S. at 243, 96 S.Ct. at 2547. The Court therefore concluded that

> no legal interest or right of these respondents under [state] law would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances.

Fano, 427 U.S. at 228, 96 S.Ct. at 2540.[2]

The Hawaii prison transfer regulations differ substantially from the statutory schemes addressed by the Supreme Court in *Fano* and *Haymes*. The regulations require that an elaborate procedure will be followed whenever a prison transfer involves a "grievous loss" to the prisoner. Other courts have recognized that the existence of certain procedures may create an expectation protected by the due process clause. *Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir. 1979); *Lamb v. Hutto*, 467 F.Supp. 562, 566 (E.D. Va. 1979); *see Sherman v. Yakahi*, 549 F.2d 1287, 1292 (9th Cir. 1977). We believe that the regulations in this case create a justifiable expectation that a prison transfer in-

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[2]New York required no hearing before prison transfers. *Haymes*, 427 U.S. at 243, 96 S.Ct. at 2547. Massachusetts required no hearing by statute, and it is not clear whether that state required transfer hearings by regulation. *Fano*, 427 U.S. at 226-27, 96 S.Ct. at 2539, 2540. Fano did receive a hearing before his transfer. *Fano v. Meachum*, 520 F.2d 374, 376-77 (1st Cir. 1975), *rev'd*, 427 U.S. 215, 96 S.Ct. 2543, 49 L.Ed.2d 446 (1976). The First Circuit opinion in *Fano* mentions only a regulation requiring disciplinary hearings at Walpole State Prison. *Id.* at 379-80. Fano, however, was confined at Norfolk State Prison, and that regulation would not apply to his transfer, even if it could be considered to be disciplinary.

volving a "grievous loss" will not be carried out unless certain procedures are followed.

The First, Second, and Sixth Circuits have rejected claims that procedures mandated by particular prison transfer regulations create a liberty interest protected by the due process clause. *Lombardo v. Meachum*, 548 F.2d 13, 15 (1st Cir. 1977); *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979); *Bills v. Henderson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980). To the extent that these cases may be read as holding that no procedural requirements can create a substantive liberty interest, unless the events which may cause a transfer are specified in those requirements, we must disagree.[3] The real issue is whether the transfer regulations create an entitlement to procedural protections. *See Greenholtz v. Inmates*, 442 U.S. 1, 12, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979).

The Hawaii regulations clearly guarantee prisoners specified procedural protections before any transfer involving a "grievous loss," and they define an interstate transfer as a "grievous loss." The regulations require that such transfers be considered by an impartial committee. The prisoner subject to transfer is entitled to prior notice of the hearing at which the committee will consider his transfer. The notice must state "what the Committee will consider at the hearing," and "any recent specific facts which

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[3] In *Lombardo*, the First Circuit interpreted the Massachusetts statutory scheme as not creating a substantive liberty interest protected by the due process clause. The court conceded, however, that a Massachusetts court might come to the opposite conclusion. 548 F.2d at 15 n.3.

may weigh significantly in the classification process." The prisoner has the right to examine all relevant, non-confidential material related to his case, a right to confront and cross-examine witnesses, a right to retain counsel and a right to respond to the evidence presented to the committee and to offer evidence on his own behalf. The regulations require that the committee "render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing." These regulations are not without substantive content. Their clear import is that a transfer will not be carried out absent a hearing directed to proof of the facts alleged in the notice received beforehand by the prisoner. In our view, these regulations create a justifiable expectation that a prisoner will not be transferred absent the specified procedures. They consequently give rise to a constitutionally protected liberty interest.

Our conclusion is reinforced by the fact that the regulations are clearly designed to protect a substantial interest of prisoners. The regulations limit the discretion of prison officials to transfer prisoners whenever a transfer involves a "grievous loss." Nor does our conclusion change because the regulations provide that the decision of the committee is merely advisory to the prison administrator, who can "[a]ffirm or reverse, in whole or in part, the [committee's] recommendation." The state argues that the quoted clause gives the prison administrator unfettered freedom to transfer inmates so that they are in fact transferable at will within the meaning of *Fano* and *Haymes*.

This argument grossly undervalues the procedural conditions which the state has imposed upon the actions of the prison administrator. The regulations certainly do not contemplate a transfer at the will of the prison administrator. He may act only after an impartial committee, from which he is excluded, has made a recommendation based upon facts specified in the notice of transfer hearing and proved at that hearing. The whole purpose of such procedural requirements is to protect against arbitrary or uninformed action by the prison administrator. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954). That goal cannot be reduced to constitutional insignificance.

We do not mean to suggest that every minor violation of prison transfer regulations will violate due process. First, it must be determined in a particular case whether the transfer regulations create an entitlement to specified procedures. Second, a deviation from the transfer regulations will assume constitutional proportions only when it affects the fairness of the process established by the regulations. *Cf. Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972). Wakinekona claims that prison officials deprived him of the independent decisionmaker guaranteed by the regulations because the committee which recommended his transfer also initiated the transfer proceedings. An impartial tribunal is one of the mainstays of procedural fairness. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 83-84, 34 L.Ed.2d 267 (1972). We therefore agree with Wakinekona that in alleging that he was deprived of the independent decisionmaker re-

quired by prison regulations, he has stated a claim under 42 U.S.C. § 1983. The district court erred in dismissing his claim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

REVERSED AND REMANDED.

GOODWIN, Circuit Judge, dissenting.

The issue is not whether Hawaii's prison authorities should transfer state prisoners without certain formalities,[1] but whether the federal constitution compels the state officers to follow to the letter those local regulations that provide inmates with an "impartial program committee" hearing if a change in prison classification results "in a grievous loss." Because I can find no federal constitutionally-protected interest in having the state follow its own rules in this case, I would affirm the district court's dismissal of this prisoner's § 1983 challenge.

Meachum v. Fano, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976), reasoned that it is the nature, rather than the weight, of the individual interest at stake that involves due process. Thus *Meachum* held that the federal constitution does not apply to transfers of inmates "absent some right or justifiable expectation rooted in state law that [the inmate] will not be transferred except for misbehavior . . upon the occurrence of other specified events." *Montanye v. Haymes*, 427 U.S. 236, 242 96 S.Ct. 2543, 2547,

[1]Redress for the alleged violation of prison rules may be available in state court, a possibility recognized by both the state and federal trial courts.

49 L.Ed.2d 446 (1976) (quoting *Meachum*)[2]. For appellant to succeed here, therefore, he ought to demonstrate the existence of a right rooted in state law that limits the prison administrator's discretion to transfer him to a California penitentiary.

No Hawaii statute or prison regulation imposes substantive limitations on the power of Hawaii's prison authorities to transfer a state prisoner to a California prison Wakinekona had argued that the prison regulations setting out specific procedures to precede interstate transfers provide the state law basis for a protected liberty interest. The district court held otherwise and I agree.

According to prison rules, a pre-transfer hearing must be held before an "impartial program committee" if a change in the prisoner's classification will cause the prisoner a "grievous loss." Art. IV Supplementary Rules and Regulations of the Corrections Division, Department of Social Services & Housing. Because the hearing scheme requires several elements frequently found in "due process" hearings, appellant argues that the existence of the procedural

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[2]*Meachum* and *Montanye* each involved intrastate prison transfers. But the first circuit's reasoning that their principles apply equally to interstate transfers is persuasive. *See Sisbarro v. Warden, Mass. State Penitentiary*, 592 F.2d 1 (1st Cir.), *cert. denied*, 444 U.S. 849, 100 S.Ct. 99, 62 L.Ed.2d 64 (1979). Although the burden to inmates will often be greater in interstate transfers, causing them more of a grievous loss, burden is no longer the determining factor for the purposes of ascertaining the procedural due process rights of transferred inmates. *Id.* at 2-3. Therefore, the distinction between interstate and intrastate transfers is irrelevant. *Id.; see also, Cofone v. Manson*, 594 F.2d 934 (2d Cir. 1979) (applying *Meachum* to a prison transfer across state lines).

scheme itself is enough to create a liberty interest in having each step of the procedure followed, even though the same correctional regulations give the administrator the power to disregard the judgment of the program committee, and Haw.Rev.Stat. 353-18[3] specifically empowers without limitation the Director of Social Services to transfer a state prisoner to a federal prison. Appellant cites no decision in support of his argument.[4]

The state's position, on the other hand, has ample support, beginning with *Meachum* itself. The prison regulations in effect when Fano was transferred "entitled" inmates to some kind of pre-transfer hearing. *Fano v. Meachum*, 520 F.2d 374, 379-80 (1st Cir. 1975), *reversed*, 427 U.S. 215, 96 S.Ct. 2543, 49 L.Ed.2d 446 (1976). Yet the Supreme Court refused to find on the record before it that state law created the claimed liberty interest. Recognition of the *Meachum* rationale led the first circuit subsequently

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[3] § 353-18 Transfer of prisoner to federal institution.

"The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such prisoner."

[4] Moreover, the Hawaii Supreme Court found in *Tai v. Chang*, 58 Haw. 386, 570 P.2d 563 (1977), that the Hawaii Administrative Procedure Act did not entitle an inmate to a hearing prior to an interstate transfer of the prisoner to a federal penitentiary conducted under Haw.Rev.Stat. 353-18. The transfer at issue in that case occurred before the adoption of Regulation IV. But the state supreme court decided *Tai* after the promulgation of Regulation IV, and in doing so did not indicate that the regulation's existence changed matters. It would seem presumptuous for federal judges to tell the Hawaii court to hold hereafter that Regulation IV limits the director's discretion under § 353-18.

to refuse to base a protected liberty interest on state mandated pre-transfer procedural safeguards. *Lombardo v. Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977). *See also Four Certain Unnamed Inmates of Mass. etc. v. Hall*, 550 F.2d 1291 (1st Cir. 1977); *Daigle v. Hall*, 564 F.2d 884 (1st Cir. 1977). *Peterson v. Davis*, 421 F.Supp. 1220 (E.D.Va. 1976), *aff'd without opinion*, 562 F.2d 48 (4th Cir. 1977), likewise held that a state's practice of affording pre-transfer hearings does not turn such hearings into a constitutional requirement.

Even where statutes require out-of-state transfers to be accompanied by "all procedural safe-guards . . . to insure due process of law," or where statutes authorize certain transfers only when "in . . . [the Commissioner's] opinion, the inmate needs particular treatment or special facilities available at . . . [the transferee institution], or it is in the best interest of the state," no federal liberty interest has been found. *Cofone v. Mason*, 594 F.2d 934, 937-38 (2d Cir. 1979). The second circuit there concluded that the grant of transfer authority was too broad to support a justifiable expectation that an inmate would not be transferred without some specified event or findings.

> "Although a Due Process Clause liberty interest may be grounded in state law that places substantive limits on the authority of state officials, no comparable entitlement can derive from a statute that merely establishes procedural requirements. . . . Since § 18—78a(b) at most directs Connecticut officials to follow certain procedures in deciding whether to transfer Cofone, and does not substantively restrict their authority to order the transfer, it cannot be the source of any right or

justifiable expectation on Cofone's part that he would not be transferred absent misbehavior." 594 F.2d at 938-39.

Because I agree with the reasoning of the first and second circuits,[5] I must respectfully dissent from the majority's unnecessary creation of a conflict among the circuits on this point.

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[5]The cases cited by the majority are not controlling. They stand for the general proposition that federal and state agencies must abide by their own regulations. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959). Even if this is a due process requirement, as the majority suggests, the question before this court is not whether the failure to follow the regulations violated due process, but whether the regulations created a liberty interest that could not be taken away without a hearing. Wakinekona raised only the latter point in his § 1983 complaint.

Confone v. Manson, 594 F.2d 934, 937 n.3 (2d Cir. 1979), held that the state regulations providing for a hearing did not give rise to a liberty interest so as to require a hearing as a matter of federal due process. The court noted that Confone had dropped the argument that his transfer deprived him of due process because it violated Connecticut's own regulations. *Lombardo v. Meachum*, 548 F.2d 13, 16 (1st Cir. 1977), also found that the regulations regarding hearings did not give rise to a liberty interest. The first circuit did not discuss *Accardi*-due process; presumably because it found that the district court did not abuse its discretion in concluding that the prison board fully complied with its regulations. I think the majority has confused these two due process points and has incorrectly concluded that the regulations created a liberty interest, thus requiring a particular type of hearing.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 78-3092

DC No. 76-0286

Delbert Kaahanui Wakinekona,
Plaintiff-Appellant

vs.

Antone Olim, Edith M. Wilhelm, John Smythe,
Winton Leong and Edwin Shimoda,
Defendants-Appellees

ORDER
AND
AMENDMENT OF OPINION

[Filed Nov. 27, 1981]

Before: GOODWIN, FLETCHER and CANBY,
Circuit Judges

A majority of the panel having voted to deny the petition for rehearing, the petition is denied. Judge Goodwin dissents and would grant the rehearing.

The suggestion for rehearing en banc having failed to receive the affirmative vote of a majority of the active judges, rehearing en banc is denied.

The opinion previously filed in this case, slip op. at 2403 (May 26, 1981) is amended as follows:

1. Immediately after the notation in the heading "Decided May 26, 1981" (slip op. at 2403), add the following

notation: As Amended on Denial of Rehearing and Rehearing En Banc, ..., 1981."

2. In the last textual paragraph of the original majority opinion after the words ". . . by the regulations" and immediately preceding the citation to *Winnick v. Manning,* (slip op. at 2407) indicate an additional footnote number 4. In the margin, then add the following footnote:

> FOOTNOTE 4: We therefore disagree with the suggestion of the dissent that our ruling imposes a constitutional requirement that state officers follow local regulations "to the letter." *Infra,* p. ..... We simply hold that the particular detailed regulations in this case create a liberty interest, and that deprivation of that interest by a biased decision-maker violates the Fourteenth Amendment. *See* L. Tribe, American Constitutional Law 555 (1978). We have no occasion to rule on what other regulations may create a liberty interest or what other procedural deviations may violate due process. It goes without saying that it would be neither sound law nor desirable policy to constitutionalize every state prison regulation.

3. At the conclusion of the original majority opinion, after "REVERSED AND REMANDED" (slip op. at 2407), add the following supplementary material, along with its footnote number 5:

On Petition for Rehearing
and Suggestion for Rehearing En Banc

The State in its petition for rehearing directs our attention to *Lono v. Ariyoshi,* 621 P.2d 976 (Hawaii 1981). In that case the Supreme Court of Hawaii dealt with the same transfer regulations involved in the present case. It

held that no fourteenth amendment liberty interest was created by the regulations because the prison administrator had unlimited discretion to order a transfer or not. 621 P.2d at 980-81. With all due respect to the Hawaii Court's conclusion, we do not find it controlling here.

It is of course the sole prerogative of the highest state court to determine the meaning of a state statute or regulation. Once that meaning is determined, however, it is a federal question whether the interest created by the state statute or regulation is to be accorded protection under the fourteenth amendment. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

We do not read *Lono v. Ariyoshi* as having interpreted Regulation IV differently from this court. While the Hawaii Court points out, as did this court, that the prison administrator ultimately has complete discretion whether or not to transfer, the *Lono* opinion does not suggest any weakening of the preconditions required by the Regulation for the exercise of the prison administrator's discretion. We have held that those preconditions establish a liberty interest within the meaning of the fourteenth amendment, and we adhere to that holding. On that federal question, we respectfully disagree with the Supreme Court of Hawaii.

Nor do we think that the result in this case is affected by *Parratt v. Taylor*, ... U.S. ....., 101 S.Ct. 1908 (1981). *Parratt* dealt with the negligent loss of a $23 hobby kit by prison officials, and the Court held that the prisoner was not deprived of his property without due process where there was a state tort claims statute that could afford full redress. That type of post-deprivation hearing was suf-

ficient, in the Court's view, to satisfy the fourteenth amendment.

We do not believe that *Parratt* applies to the present case. The majority opinion in *Parratt* concentrates on the problems inherent in turning federal courts into forums for dealing with common law torts that are the regular business of state courts. 101 S.Ct. at 1917. The present case, dealing with a liberty interest, is of a wholly different nature. Indeed, Justice Blackmun's concurring opinion (joined by Justice White) in *Parratt* suggests that the *Parratt* ruling is confined to deprivation of property. 101 S.Ct. at 1918. In short, *Parratt* is simply a different case from the present one.

It is true that there is general language in the majority opinion in *Parratt* suggesting that where a deprivation occurs because a state *fails* to follow its procedure rather than *because* it follows its procedure, and there is a state court remedy, then the state has provided all the process that is due. 101 S.Ct. at 1917. But this statement must be read in the context in which it was made, that of a tortious deprivation of property for which the state provides a tort remedy. A broader reading that would apply to the present case would remit all § 1983 cases to state courts whenever the conduct complained of violated state law as well as the federal Constitution. The result would be to read into § 1983 a requirement of exhaustion that has consistently

been rejected by the federal courts.[5] *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); *Canton v. Spokane School District*, 498 F.2d 840, 844 (9th Cir. 1974). For this reason, also, we conclude that *Parratt* does not control the present case.

The petition for rehearing is denied. Judge Goodwin dissents and would grant the rehearing. The suggestion for rehearing en banc having failed to receive the affirmative vote of a majority of the active judges, rehearing en banc is denied.

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[5]It is also clear that *Parratt* cannot be read as holding that a state court remedy for a violation of the fourteenth amendment itself provides all the process that is due. The problems with such a circular proposition are insurmountable. Section 1983 actions may be brought in state court. *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980). State courts are obligated to enforce applicable federal law. U.S. Const. art. VI, § 2. By entertaining § 1983 actions, a state court consequently provides a remedy for state deprivation of any federal right. To say that such a remedy provides all the process that is due from a state would be to deprive the federal courts of primary enforcement of any federal rights. *Parratt* of course evinces no such intention.

Appendix C

Delbert Kaahanui Wakinekona,
Plaintiff,

v.

Antone Olim, Edith M. Wilhelm, John Smythe,
Winton Leong and Edwin Shimoda,
Defendants.

Civ. No. 76-0286.

United States District Court,
D. Hawaii.

June 8, 1978.

MEMORANDUM AND ORDER

WONG, District Judge.

Defendants have moved for summary judgment pursuant to Rule 56, F.R.Civ.P., seeking a dismissal of plaintiff's First Amended Complaint. Defendants had previously moved to dismiss plaintiff's original complaint, which was denied by this court. Defendants, in effect, are asking this court to reconsider its previous order denying dismissal.

Plaintiff Wakinekona, sentenced to life imprisonment without parole by the Hawaii State court, was an inmate of the Hawaii State Prison confined to the maximum control unit. On August 2, 1976, Wakinekona appeared before a board designated as a Program Committee of the Hawaii State Prison for a hearing, the stated purpose of which was to determine the reason for which the programs at the maximum control unit of the Hawaii State Prison had failed. Three days later, he was served with a written

notice that he would have a further hearing to determine his program designation at the Hawaii State Prison, which included a possible transfer to an out-of-state penal facility. On August 10, 1976, a hearing was held on plaintiff's program classification before the same members of the same committee. The committee rendered its decision the next day and thereafter served a written copy of it to the plaintiff. Based on this decision, the plaintiff was transferred to Folsom State Prison in California.

In his First Amended Complaint, plaintiff claims, *inter alia*, that the decision rendered by the committee was violative of the due process clauses of the Fifth and Fourteenth amendments to the United States Constitution since it was "rendered by a board the composition of which was biased and prejudicial against the Plaintiff and consisted of persons who were directly responsible for the initiation of said hearing. . . ." Plaintiff further claims that his transfer violated the purpose of the program classification hearing which was governed by state regulations promulgated and issued by the Corrections Division of the Hawaii State Department of Social Services and Housing.

In its Memorandum and Order dated October 1, 1976, 421 F.Supp. 83, this court held that the hearing conducted on August 10, 1976 before a board consisting of the same members who sat on the August 2, 1976 committee violated plaintiff's constitutional right to due process. This court's holding was based on its reading of *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In that case, the Supreme Court held that although the Constitution does not guarantee good-time credit for satis-

factory behavior while in prison, where the state itself provided a statutory right to good time and specifies that it is to be forfeited only for serious misbehavior, the prisoner has acquired an interest which "has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. . . ." *Id.* at 2975.

In *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed. 2d 452 (1976), the Supreme Court held that the Due Process Clause does not protect a duly convicted prisoner against transfer from one institution to another within the state prison system. It asserted that *Wolff* was distinguishable because "The liberty interest protected in *Wolff* had its roots in [Nebraska] state law . . . ." *id.* at 2539, whereas in the *Fano* case, ". . . Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct." *Id.* at 2539.

In its October 1, 1976 Memorandum and Order, this court thought that *Fano* was "not on point because it does not involve a state-created right." It was pointed out that *Fano* held that a state prisoner is not entitled, under the Due Process Clause of the Fourteenth Amendment, "to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, ***absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.***" Citing from 96 S.Ct. at 2534, with emphasis added.

This court was then of the opinion that the State of Hawaii did create a right to plaintiff to a fair hearing by promulgation of the regulations by the Corrections Division.[1]

After this court issued its Memorandum and Order, the First Circuit Court of Appeals had occasion to address itself to the applicability of *Fano* in the context of prisoner rights created not by a state statute but by state departmental regulations not in effect at the time *Fano* was decided. In *Lombardo v. Meachum*, 548 F.2d 13 (1st Cir. 1977), the pertinent regulations provided that an inmate would receive some type of hearing before his reclassification. The regulations, however, did not impose standards limiting the discretion of prison authorities with respect to prisoner transfers. The Court therefore concluded that the regulations did not create "the kind of substantive interest which is required before a state created 'liberty' interest can be said to exist." *Id.* at 15.

In *Four Unnamed Inmates of Mass. Correctional Institution v. Hall*, 550 F.2d 1291 (1st Cir. 1977), the appellate court reversed the district court's order compelling the

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[1]Article IV of the "Supplementary Rules and Regulations of the Corrections Division," entitled "The Classification Process," declares that classification "never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community." The inmate is granted the right to appear during the Program Committee hearing "if a change, modification, or transfer is planned which would result in a grievous loss." The "impartial Program Committee [is to be] composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee."

prison officials to give inmates notice of charges and disciplinary hearings. The district court was of the belief that the pertinent prison regulations severely restricted the discretion of prison officials to order transfers in the absence of misconduct. The court of appeals stated:

> But this circuit has recently held that the present prison regulations dealing with reclassification do not impose substantive standards on the decision to transfer an inmate. *Lombardo v. Meachum*, 548 F.2d 13 (1977). Freedom from transfer is not a "liberty interest" since an inmate may be transferred at the whim of the Commissioner. Because no "liberty interest" has been infringed by the transfer, due process does not attach, and the district court's order cannot stand.

This court is persuaded that the position taken by the First Circuit Court of Appeals is the correct one and that this court's original Memorandum and Order must be reversed. The prison authorities in Hawaii are granted practically unlimited discretion to transfer state prisoners. Section 353-18 of the Hawaii Revised Statutes provides:

> The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such prisoner.

The pertinent Hawaii State regulations do not contain standards governing the administrator's exercise of such discretion. Indeed the regulations reserve in the administrator, "as the final decisionmaker," the right to affirm or reverse, wholly or partially, the recommendation of the Program Committee. Since Wakinekona's transfer did not

implicate a constitutionally-protected "liberty interest," due process did not attach. The First Claim for Relief alleging a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution must therefore be dismissed.

The First Claim for Relief also alleges a violation of the Hawaii State Constitution. The Second Claim for Relief claims a violation of the state regulations discussed earlier, and the Third Claim for Relief is grounded on an alleged "malicious and willful violation of state law." These claims arise exclusively under the state constitution, regulations, and statute. Here, as in *Lombardo v. Meachum, supra*, the sole basis for the exercise of federal jurisdiction over Wakinekona's state law claim was that, at the time the action was instituted, Wakinekona presented a substantial federal claim, and the state claim arose from the same nucleus of operative facts. In *Lombardo*, the court stated that its holding would require that the state law claims involved in that case be heard in the state court since there was no substantial federal due process claim to which such state law claims may be appended. This court concludes that Wakinekona's state claims must likewise be heard in the state court.

The plaintiff's First Amended Complaint is accordingly dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

So ordered.

Appendix D

IV

THE CLASSIFICATION PROCESS

1. *General:*

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. *Composition:*

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. *Procedure:*

So long as a transfer involves a grievous loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man.

Thus, transfer from Hawaii State Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. *Pre-hearing detention.* An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. *Notice.* The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. *Hearing.* The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result in a

grievous loss. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) *Confrontation and cross-examination:*

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontatation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard:* The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute:* No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. *Findings.* The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or in part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. *Review:*

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

V

LEGAL COUNSEL

Notwithstanding the foregoing Supplementary Rules and Regulations, an inmate/ward may retain legal counsel only in the following specific situations:

1. Classification Process:

a. For a potential Interstate transfer.

b. For a potential transfer to an increased security classification longer than 30 days.

2. Adjustment Process:

a. For a potential segregated punishment longer than 30 days.

b. For any rule violation which also constitutes a criminal felony.

Appendix E

Peter Lono, Plaintiff-Appellant,

v.

George Ariyoshi, individually and in his capacity as Governor of Hawaii; Andrew Chang, individually and in his capacity as Director of Social Services & Housing, State of Hawaii; Michael Kakesako, individually and in his capacity as Administrator, Corrections Division, Department of Social Services & Housing; Antone Olim, individually and in his capacity as Administrator, Hawaii State Prison; and Edwin Shimoda, individually and in his capacity as Chairperson, Lono Program Committee, Defendants-Appellees.

No. 6729.

Supreme Court of Hawaii.

Jan. 2, 1981.

Before RICHARDSON, C. J., MENOR and OGATA, JJ., and Retired Justice MARUMOTO in place of KOBAYASHI, J., excused.*

MARUMOTO, Justice.

This is an appeal by plaintiff Peter Lono from the order of the First Circuit Court dismissing his complaint against

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*Justice Kidwell, who heard oral argument in this case, retired from the court on February 28, 1979. HRS § 602-10 (1979 Supp.) provides: "After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice."

the Governor of Hawaii, and other State officials concerned with the administration of Hawaii State Prison (HSP).

In the complaint, plaintiff sought temporary and permanent injunctive relief against his transfer from HSP to a mainland penal institution, and a declaratory judgment that his transfer would be in violation of the constitutions of the United States and the State of Hawaii, and the Supplementary Rules and Regulations of the Corrections Division (Rules) of the State Department of Social Services and Housing (DSSH).

Plaintiff was convicted of murder in the second degree in the First Circuit Court, and was sentenced to a maximum term of 90 years in HSP on November 19, 1970. Thereafter, the following events transpired within the HSP administration:

January, 1976: Plaintiff and five other HSP inmates were segregated from the general prison population on the basis of information from confidential sources that they were leaders of an inmate strike. For his participation in the strike, plaintiff was sentenced to one year in the maximum control unit. However, that sentence was suspended, and plaintiff remained in the general prison population.

Summer, 1976: State of Hawaii arranged with the Bureau of Prisons, United States Department of Justice (FBP), and the State of California, to transfer HSP inmates to mainland prisons during the construction of new prison facilities in Hawaii.

September 27, 1976: HSP administrator submitted a tentative list of eight inmates, including plaintiff, to FBP for its approval. However, no decision to transfer had been made at that time.

November 8, 1976: FBP informed HSP administrator that it would accept plaintiff at the Federal prison on McNeil Island, Washington.

February 11, 1977: HSP Program Committee (PPC) notified plaintiff to be present at the committee meeting on February 16, 1977, to be held for the following purpose:

> Reason for meeting: To determine whether your classification within the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, and the security of the State facilities and personnel. The Committee will consider whether you should remain at HSP, or be transferred to a mainland state or federal institution.

February 22, 1977: PPC meeting, which was originally scheduled to be held on February 16 was postponed at the request of plaintiff's counsel and was held on this day. At the meeting, PPC chairman read a letter from HSP administrator to a State deputy attorney general regarding plaintiff's organization of the inmate work strike and his segregation from the general inmate population. The administrator declined to testify at the meeting because he was the reviewing officer of PPC findings. PPC also considered information from a confidential source regarding plaintiff's drug involvement and covert backyard predatory activities. At the conclusion of the meeting, PPC recommended that plaintiff be transferred to a mainland Federal prison, pursuant to its findings that (a) plaintiff posed a behavioral/management problem; (b) his maximum security classification restricted his participation in HSP programs; and (c) there were more programs available to him at a Federal prison.

March 3, 1977: HSP administrator sustained PPC recommendation.

On March 16, 1977, plaintiff filed his complaint in the circuit court. The circuit court, after denying the temporary injunctive relief sought by plaintiff, entered its order denying permanent injunction, and dismissing the complaint, on August 11, 1977.

In the meantime, plaintiff was transferred from HSP, first to the Federal prison on McNeil Island, and later to the Federal prison at Marion, Illinois.

On this appeal, plaintiff has presented the following four questions for decision by this court: first, whether the procedure followed by PPC at its meeting on February 22, 1977, violated his due process rights under the fourteenth amendment of the United States constitution; second, whether it violated his due process rights under Article I, Section 4, of the Hawaii constitution; third, whether it violated his procedural rights under the Rules; and, fourth, whether it violated his procedural rights under the Hawaii Administrative Procedure Act (HAPA).[1]

The first three questions are questions as to which plaintiff sought declaratory judgment in his complaint. The fourth question was not raised by plaintiff in his complaint, or any amendment thereto, but was brought up orally by plaintiff's counsel in his argument in the circuit court.

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[1]Article I, Section 4, of the Hawaii constitution, referred to in this case, is incorporated in Article I, Section 5, of the Hawaii constitution, as amended and in force January 1, 1979.

A state prisoner's procedural rights under the United States constitution are outlined in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The procedure set forth in *Wolff v. McDonnell* is triggered only when a state action involves an infringement of state prisoner's property or liberty interest. This point is not disputed by plaintiff.[2]

Under *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), the only source of a state prisoner's protected interest is state law.

Plaintiff has not contended that he had any property interest which was subject to infringement by his transfer from HSP to a mainland Federal prison.

That narrows our inquiry to whether plaintiff had any liberty interest under Hawaii law which would have triggered the application of the procedural requirements of *Wolff v. McDonnell*.

Plaintiff asserts that HRS § 706-672, and Rule IV of the Rules, clothed him with the requisite liberty interest.

HRS § 706-672 provides that, when a person is sentenced to imprisonment for an indeterminate term, the court shall commit him to the custody of DSSH for the term of his sentence and until he is released in accordance with law; that the court shall determine the initial place of confine-

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[2]It is stated in plaintiff's opening brief filed in this appeal:

> It has long been established that due process is required by the fourteenth amendment only when the state infringes a "liberty" or "property" interest.

ment; and that the director of DSSH shall determine the proper program of redirection and any subsequent place of confinement best suited to meet the individual needs of the committed person.

Rule IV of the Rules, which was in effect at the time plaintiff's hearing was held, dealt with the classification process, as distinguished from the adjustment process, and stated that it never inflicted any punishment but was concerned with a continuing evaluation of each individual inmate to ensure his optimum placement within the Corrections Division.

With regard to HRS § 706-672, plaintiff contends that it provides a prisoner "with the expectation that he will not be moved to another prison unless it is determined that the transfer is better suited to his needs."

Similarly, with respect to Rule IV of the Rules, it is contended that, under the rule, "the prisoner has a justifiable expectation rooted in Hawaii law, that he will not be transferred unless it is determined by an impartial committee that optimum placement lies within another institution."

In connection with plaintiff's contention based on HRS § 706-672, as well as his contention based on Rule IV of the Rules, *Meachum v. Fano, supra,* and *Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976) are pertinent.

Meachum v. Fano presented to the United States Supreme Court two questions for decision on a petition for a writ of certiorari from a judgment of the United States Court of Appeals for the First Circuit.

The first question was whether the United States constitution required Massachusetts correctional officials to conduct fact finding hearings in connection with transfers of duly convicted state prisoners from a medium security correctional facility at Norfolk to maximum security correctional facilities at Walpole and Bridgewater, where the living conditions were substantially less favorable to them than at Norfolk, in the absence of a state law or practice which conditioned such transfers on proof of serious misconduct or occurrence of other specified events. The second question was whether the hearings granted in the case were adequate.

The court answered the first question in the negative. In the light of its answer to the first question, the court did not reach the second question.

In answering the first question in the negative, the court rejected at the outset the notion that any grievous loss visited upon a person by a state is sufficient to invoke the procedural protections of the due process clause of the constitution, held that the determining factor is the nature of the interest involved, and made the following statements which are equally applicable to the case at hand:

> The initial inquiry is whether the transfer of respondents from Norfolk to Walpole and Bridgewater infringed or implicated a "liberty" interest of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not.
>
> • • •
>
> [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the ex-

> tent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.
>
> • • •
>
> Transfers between institutions * * * are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.
>
> • • •
>
> Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events.
>
> • • •
>
> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him to whatever reason or for no reason at all.

Montanye v. Haymes was decided by the United States Supreme Court on the same day as *Meachum v. Fano* on a petition for a writ of certiorari from the judgment of the United States Court of Appeals of the Second Circuit.

The case involved the removal of respondent, a New York state prisoner, as inmate clerk in the law library at Attica Correctional Facility, and his transfer, without a hearing,

to Clinton Correctional Facility. Both facilities are maximum security institutions. Respondent's transfer was made for preparing, and circulating among other inmates, a document regarding prison administration in direct disregard of applicable prison rule. The transfer did not involve loss of good time, segregated confinement, loss of privilege, or other disciplinary measures.

Under the New York law, as described in the court's opinion in the case:

> (a) adult persons sentenced to imprisonment are not sentenced to particular institutions, but are committed to the custody of the Commissioner of Corrections;
>
> (b) the Commissioner receives adult male felons at a maximum security reception center for initial evaluation and transfer to specified institutions;
>
> (c) the Commissioner may thereafter transfer the inmates from one correction facility to another;
>
> (d) transfers of inmates are not conditioned upon or limited to the occurrence of specific misconduct;
>
> (e) no conditions are imposed on the Commissioner's discretionary power to transfer;
>
> (f) transfers are not among the punishments which may be imposed only after a prison disciplinary hearing.

Upon reviewing the New York law, the court held that respondent had no right to remain at any particular prison facility and no justifiable expectation that he would not

be transferred unless he was found guilty of misconduct, and stated:

> Whatever part an inmate's behavior may play in a decision to transfer, there is no more basis in New York law for invoking the protections of the Due Process Clause than we found to be the case under the Massachusetts law in the Meachum case.

The provisions of Hawaii law relating to placement and transfers of persons sentenced to imprisonment are substantially the same as the New York law described in *Montanye v. Haymes*, except that, in HRS § 706-672, the words "place of confinement best suited to meet the individual needs of the committed persons" are used in referring to place of confinement upon transfer, and, in Rule IV of the Rules, the words "optimum placement within the Corrections Division" are used in connection with place of confinement upon classification.

In our opinion, the quoted words do not limit the authority of the director of DSSH in selecting a place of confinement upon a decision to transfer or upon classification.

The following language in *Lombardo v. Meachum*, 548 F.2d 13 (1st Cir. 1977), is applicable in construing those words:

> The regulations plaintiff relies upon * * simply provide that an inmate will receive a certain type of a hearing before he is reclassified. The regulations contain no standards governing the Commissioner's exercise of his discretion, and they, therefore, cannot

> create the kind of substantive interest which is required before a state created "liberty" interest can be said to exist.

Similarly, the language in HRS § 706-672 and the language in Rule IV of the Rules, upon which plaintiff relies, contain no standards governing the determination by the director of DSSH of a place of confinement best suited to meet the individual needs of the committed person and optimum placement of the committed person within the Corrections Division, thereby leaving the determination of those matters entirely to the discretion of the director.

Thus, HRS § 706-672 and Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States constitution.

On the question regarding violation of his due process rights under the Hawaii constitution, plaintiff cites *Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972), and *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974), and argues that, under Hawaii law, substantiality of interest, rather than its source, gives rise to protected interest.

Silver v. Castle Memorial Hospital and *Aguiar v. Hawaii Housing Authority* are not apposite. Both cases involved property interest, and the determining factor was the fact that the plaintiffs in those cases had property interest in the matters in controversy.

We hold that under the Hawaii constitution, the determining factor is the nature of the interest involved, rather than its weight, as the United States Supreme Court held in *Meachum v. Fano, supra,* with respect to procedural protections under the due process clause of the United States constitution.

With respect to plaintiff's contentions based on claim of violation of his procedural rights under the Rules, we find the same to be without merit, upon a careful examination of the points raised in plaintiff's brief and the relevant provisions of the Rules.

Our answer to the question posed by plaintiff as to whether the procedure followed by PPC at his classification hearing violated his procedural rights under HAPA depends on whether the hearing involved a contested case under HAPA.

HRS § 91-1(5) defines contested case as a proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

The question posed by plaintiff is answered by *Tai v. Chang,* 58 Haw. 386, 570 P.2d 563 (1977).

In that case, petitioner sought a writ of habeas corpus and injunctive relief in connection with his transfer from HSP to the United States Penitentiary in Atlanta, Georgia, and alleged, as one of the grounds for relief, that he was not accorded a hearing before his transfer.

This court denied the requested relief on the ground that his transfer did not involve a contested case and the HAPA hearing requirement did not apply, stating as its reason for the denial:

> Since the phrase *required* by *law* embraces both constitutional as well as statutory law * * *, ordinarily both would be examined to see if appellant was entitled to a hearing before his transfer. No constitutional issues, however, are before this court as none were raised below. Looking solely to statutory law, a review of such laws in effect at the time of appellant's transfer in 1966 yields nothing which entitled him to a hearing.

We have shown earlier in this opinion that there is nothing in the United States constitution, the Hawaii constitution, or the Hawaii statutory law, which entitles plaintiff to a hearing.

Affirmed.